No. 75-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I N D E X

CITATIONS

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Allen V. Bowles, on behalf of Gabriel Francis Antelope, et al., submits respondents' brief in opposition to petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTIONS PRESENTED

1. Whether legislation affecting Indians and Indian country is racial in nature.

2. Whether, if the preceding question is answered in the affirmative, consistency in federal criminal law is such a proper governmental objective which justifies disparate treatment between Indians and non-Indians.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

The essence of the holding of the court of appeals in this case is that the government is not permitted to accomplish through discriminatory jurisdiction what it can not do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered.

The classification of Indians under 18 U.S.C. 1153 is racial in nature, invidious or capricious, and not related to a compelling governmental objective.

The Court's decision recognizes that consistency in federal criminal law is ordinarily a valid legislative objective, but such objective is subject to a citizen's right to equal treatment under the United

States Constitution.

1. There is little doubt that Congress has the right to grant federal jurisdiction over Indians, but not when it requires a substantive law to be applied which discriminates on the basis of race. The federal government can not succeed in discriminating on the basis of race procedurally where it is prohibited from discriminating on the basis of race substantively, just as states in several black-race cases were prohibited from skirting racial discrimination issues regardless of the manner.

It has long been recognized that substantive law supersedes procedural law when the two conflict. The rule of priority between substantive law and procedural law can not be applied to require federal substantive law to be applied when the distinction between application of federal substantive law and state substantive law is purely racial and the disparity of treatment is significant.

The disparity between I.C. 18-4003 and 18 U.S.C. 1111 and the lessening of the government's burden of proof creates a serious substantive disadvantage to the defendant. U.S. v. Cleveland, 503 F2d 1067 (1974).

The circuit courts that have addressed themselves to 18 U.S.C. 1153 cases and which held 18 U.S.C. 1153 to be constitutional have done so because the difference in wording between the federal statute and the comparable state statute has been only a difference in nomenclature, and not substantive law. The same elements have been present in both. U.S. v. Analla, 490 F2d 1204 (1974).

Conversely, where there is a significant difference between the federal statute and the comparable state statute which has worked to the Indians disadvantage, the circuit courts are in agreement that discrimination on the basis of race has occurred. In U.S. v. Boone, 347 F.Supp. 1031 (1972), the Court held that since the absence of the element of intent existed, rendering the prosecution's burden of proof less onerous under the federal substantive law than under the state substantive law and that the Major Crimes Act applied only to Indians, "an equal protection issue is squarely presented," at 1034.

This Court in Keeble v. U.S., 412 U.S. 205 at 212 (1973) stated much the same idea,

> "That is emphatically not to say, however, that Congress intended to

> deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant."

The principle of noncircumvention of discrimination by the use of procedural rules was broadly applied in Yick Wo v. Hopkins, 118 U.S. 356 (1886) wherein the Court stated,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered . . . , so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Hence, the application of a constitutional law can become invalid either by administrative maneuvring or procedural inconsistencies.

2. 18 U.S.C. 1153 provides for a racial classification, "any Indian . . .", which classification invidiously discriminates against Indian defendants in Idaho based

solely on race by lessening the government's burden of proof for a first degree murder conviction. As Justice Stewart remarked in McLaughlin v. Florida, 379 U.S. 184 (1964), ". . . it is simply not possible for a state law (or in this case a federal law) to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." In the present case the degree or severity of the criminal act with which the defendant was charged was based solely on race.

There is no question that 18 U.S.C. 1153 is a racial classification. U.S. v. Cleveland, 503 F2d 1067 (1974); U.S. v. Analla, 490 F2d 1204 (1974); U.S. v. Boone, 347 Fed. Supp. 1031 (1972); Henry v. U.S., 432 F2d 114 (1970); Gray v. U.S., 394 F2d 96 (1967).

> ". . . it hardly needs to be observed that section 1153 is founded upon a racial classification and, as illustrated here, may in some respects result in further racial distinctions. It is also clear that racial classifications are constitutionally suspect, . . . and suspect to the most rigid scrutiny." Kills Crow v. U.S., 451

F2d 323 (1971).

Just as one can not elect to become a black, so one can not be adopted to become an Indian. 41 Am. Jur.2d 1. The racial characteristics of an Indian are everpresent in the man himself and the only additional requirement to come within the purview of 18 U.S.C. 1153 is that the alleged crime occurred within Indian country. 18 U.S.C. 1153 makes no provision for limiting its application to particular North American Indian tribes, however, it goes without argument that 18 U.S.C. 1153 would only apply to North American Indians who are American citizens. In U.S. v. Ives, 504 F2d 935 (1974), the Court stated,

> "Although Ives had requested that his name be removed from the rolls of the Colville tribe in 1969, it was not done. But enrollment or lack of enrollment is not determinative of Ives' status as an Indian." Ex Parte Pero, 99 F2d 28 (1938).

3. Once the statute in question has been determined to include a racial classification, then in accordance with McLaughlin, supra at 196,

"Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification. . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." (emphasis added).

Is wardship or consistency of Federal criminal law enforcement compelling governmental interests sufficient to sustain the racial classification in the present case?

A. The question of the guardian and ward relationship between the Federal government and the Indians as being reasonably related to any governmental interest has been previously decided in at least two circuit court decisions.

In U.S. v. Big Crow, 523 F2d 955 (1975) the Court held that the racial classification was not even rationally "tied to the fulfillment of Congress' unique obligation toward Indians."

"It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection."

id. at 959.

"In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objective and is therefore arbitrary and invidious in violation of the due process clause of the 5th Amendment."

Boone, supra, at 1035.

What guardian would subject its ward to harsher penalties or lesser burdens of proof on criminal indictment under the guise of protection of the ward? The wardship doctrine of 1885 is not so compelling in 1976 to allow racial discrimination on a per se basis as is made possible pursuant to the provisions of 18 U.S.C. 1153.

B. The issue of whether consistency of Federal criminal law enforcement is a compelling governmental interest sufficient to sustain the racial classification contained within 18 U.S.C. 1153 does not appear to have been previously decided.

The main purpose of the Major Crimes Act of 1885 was to prevent lawlessness. The same theme was reiterated in the adoption of Public Law 280, 18 U.S.C. 1162. Congress' intent has not been to apply federal substantive law to all crimes listed in the Major Crimes Act. The amendments of 1966 and 1968 have expressly designated certain crimes to be defined by state substantive law. Public Law 280, with its amendments, make possible state jurisdiction over all criminal cases. The policy is to assimilate the Indians into the states, without interfering with tribal law and sovereignty. This Court has previously indicated a similar desire to allow Indians to govern themselves where possible and practical.

The only reason federal jurisdiction is continued to any degree presently is the danger of state discrimination against Indians. The danger of discrimination is correctly resolved by application of federal procedure with state substantive law.

Uniformity and consistency are more completely in operation with the application of state substantive law and federal procedural law than the proposed federal blanket coverage. Total federal application of its

substantive laws is contrary to at least three previous United States Supreme Court decisions and Congress' current intent. see, New York ex rel. Ray v. Martin, 326 U.S. 496; Draper v. United States, 164 U.S. 240; United States v. McBratney, 104 U.S. 621.

The practical effect of the Ninth Circuit's holding is to alleviate the invidious racial discrimination of 18 U.S.C. 1153, to adhere to the present intent of Congress as exhibited by the 1966 and 1968 amendments to 18 U.S.C. 1153 and the amendments to Public Law 280, and to continue the current approach of the circuit courts decisions assimilating the Indians into the states social and judicial systems, without interfering with tribal law and sovereignty.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

ALLEN V. BOWLES,
Counsel for Respondent.

January, 1976.

CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing three (3) printed copies of Brief of Respondent in Opposition to Petition for Writ of Certiorari in the United States post office with air mail postage prepaid, addressed to Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, on the 9th day of January, 1976.

Allen V. Bowles

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Counsel for Respondent.